IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 786 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NITIN VALLABHDAS SHAH & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR.H.N.JOSHI, FOR M/S THAKKAR ASSOC. for Appellants.
MS.PANDIT, ADDL. PUBLIC PROSECUTOR for Opponent,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 10/08/2007

ORAL JUDGMENT

Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence passed by the learned Special Judge, Panchmahal at Godhra in

Special Case No.6 of 2000 on 4th September, 2001, the present appellants-original accused have preferred the present appeal under the provisions of Section 374 read with Section 386 of the Code of Criminal Procedure. The learned trial Judge has held both the appellants-accused held guilty of the charge of offence punishable under Section 3 read with Section 7 of the Essential Commodities Act, 1955 and sentenced them to undergo simple imprisonment of two years and to pay a fine of Rs.5,000/- each, in default of making payment of fine, to undergo one month simple imprisonment.

2. Mr.Joshi, learned Counsel for the appellants has taken this Court through the basic case of prosecution and the evidence led during the course of trial. It is submitted that the finding of the learned trial Judge is erroneous and certain crucial aspects have not been considered by the learned trial Judge and that has resulted into erroneous finding of guilt.

2.1 While developing the arguments Mr.Joshi has

concentrated his submissions mainly on three aspects. Firstly, it would be beneficial to state the case of prosecution for appreciating the rival side submissions that have been made to this Court by Mr.Joshi and learned A.P.P., Ms.Pandit.

3. According to prosecution on 30th September, 1996, the Civil Supply Inspector, Panchmahal at Godhra inspected the petrol pump of the accused running in the name and style of M/s.Maneklal Gordhandas and Company. The visiting Officer had examined the density of two liquid petroleums viz., the motor spirit and high speed diesel and thereafter the samples of petrol and diesel were drawn and sent for analysis to F.S.L. The sample of high speed diesel was found well whereas; the sample of petrol did not stand to the test and variation was found more than 0.0030 minimum prescribed and was not in accordance with the norms prescribed under the relevant Rule known as the Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990. Thereafter, on 22nd February, 1997 the Collector, Panchmahal issued an

order to file a Criminal Complaint and Deputy Mamlatdar had filed a formal complaint on 21st February, 1997.

4. While developing the argument Mr.Joshi has concentrated his argument mainly on three pints. He has further submitted that at the time of sudden spot inspection conducted by the Civil Supply Inspector, the density was found in accordance with the density mentioned in the register, which is required to be maintained by the authorized distributor of motor spirit and high speed diesel. As per inspection report dated 30th September, 1996 (Exh.8), according to which no difference in the density register vis-a-vis in the density of motor spirit and high speed diesel was found by the Inspecting Officer at the spot. The difference was shown (-)0.0006. At that very time there was some difference found in the density of the high speed diesel but it was in the permissible limit of variation. So, there was no need for the Inspector to draw the sample of high speed diesel and to get it analyzed by the F.S.L. So, the act of Visiting Officer of drawing sample was

contrary to the policy decision taken by the Under Secretary, Food and Civil Supply Department, Gandhinagar vide 13th January, 1995 for maintaining the supply as well as distribution of motor spirit and high speed diesel, copy whereof is produced at Exh.31. The trial Court ought to have given the benefit of doubt to the accused persons on this ground only.

4.1 The second point canvassed by Mr.Joshi is that the authority who intends to draw the sample for analyzing it with F.S.L., is under the statutory obligation for drawing the sample in a particular manner prescribed under the relevant Order. Rule-8 of Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990 provides about the sampling of the product and Mr.Joshi mainly relies on sub-rule 4 of Rule-8 of that Order. The procedure prescribed under the said Rule was not strictly adhered to. The adulteration has been defined in Clause-(a) of Rule-2 of the Order and the accused persons were not prosecuted for any other malpractices than alleged adulteration and to

prove adulteration the prosecution is supposed to establish that the case against the accused is of adulteration and because of such adulteration, particularly in petroleum product, that is, motor spirit or high speed diesel, the accused were failed in maintaining its density. In all sub-rule 4 of Rule 8 of the Order clearly indicates that it is a mandatory in nature. Rule 8 of the Order by itself is a scheme of drawing and sealing of the sample which speaks that the authorized Officer is under obligation to sign jointly alongwith the dealer from whose premises the sample is being drawn. It would be beneficial to reproduce the relevant sub-rule 4 of Rule 8 hereinafter.

“8.SAMPLING OF PRODUCT

(1) xxxxxx

(2) xxxxxx

(3) xxxxxx

(4) The sample lable should be jointly signed by the Officer who has drawn the sample, and the

dealer or transporter or concerned person or his representative and the label shall contain information as regards the product name of retail outlet, quantity of sample, date, name and signature of the officer, name and signature of the dealer or transporter or concerned person or his representative."

There is nothing on record as such which can be said to be reliable in nature. Why the lable affixed on sample of motor spirit or diesel would not be signed jointly by the Officer who had drawn the sample and whether the dealer or transporter or person concerned or his representative was present at the spot at the time of drawing of the sample. Undisputedly the sample was drawn from a retail outlet and in that situation the signature of the dealer or his representative ought to have been taken. The Panchnama does not indicate nor the deposition of the witnesses examined about the same. Because there is no evidence that lable was signed by the dealer or his representative and they were sealed in presence of Panchas or in the presence of any responsible officer otherwise this fact could have been stated by the Officer who was present at the

time of drawing and sealing of the sample. Therefore on account of violation of sub-rule 4 of Rule 8, the learned trial Judge ought to have ignored the finding of F.S.L. Report and could have acquitted the accused persons.

4.2 The third point argued by Mr.Joshi is that if the F.S.L. Report is taken into consideration then also the variation found by F.S.L. is negligible. So, it was not proper for the trial Court to jump to a conclusion that this is a fit case of adulteration. If the variation is comparatively high even then it is possible by the laboratory sometime for ascertaining by adding some other liquid and to know about adulteration. True it is that variation was found more than negligible and permissible under the Rule, but that by itself would not make the accused guilty for the adulteration as defined in the Rule. Because, as observed by the Apex Court, the prosecution is supposed to establish the element of *mens rea* even in essential commodities case.

4.3 Mr.Joshi has placed reliance on one decision

of this Court in case of **Panchvati Auto Center and Anr. Vs. State of Gujarat and Anr., reported in 2007 (2) G.L.H. 240,** where the learned Single Judge ordered to quash the proceedings initiated for alleged adulteration in the motor spirit and high speed diesel on the strength of F.S.L. Report received after analyzing the sample which was drawn during the spot inspection. The ratio says that cases where the variation beyond permissible limit in the analysis of F.S.L. Report is found negligible, the addition of any foreign substance cannot be inferred and where there is chance to secure conviction for order of punishment is extremely remote then such proceedings can be quashed and the the Court ultimately decided to quash the proceedings.

4.4 For short according to Mr.Joshi, keeping the ratio of this judgment at least the accused should be given the benefit of doubt and appellants may be acquitted from the charges levelled against them.

5. Learned A.P.P., Ms.Pandit has submitted that

in the present case sample was sent for analysis and the variation noticed by the expert after analysis of motor spirit drawn from retail outlet of the accused persons clearly indicates that it was substandard and the Court should presume adulteration when the sample is not capable to meet with the standard prescribed and the variation is more than the minimum negligible permitted. Second submission made before the Court is that merely because of certain guidelines were issued, the Officer cannot be said to have acted unauthorizedly in sending the sample for analysis. On the contrary, the behaviour of the Officer was objective and therefore the sample of high speed diesel as well as spirit both were sent for analysis and it would not be proper for the Court to presume that sample must have been tampered with. The density found by the Government Officer during the spot inspection may be the outcome of an error. So, the F.S.L. Report should be given more weightage than the comparison made at the spot.

6. In response of the query raised by the Court, learned A.P.P., has fairly accepted that none

of the prosecution witnesses has proved that the procedure in drawing of the sample was followed strictly and in compliance of sub-rule-4 of Rule-8, as relied upon by Mr.Joshi.

7. In view of the aforesaid submissions and the facts pointed out by Mr.Joshi it is clear that the learned trial Judge has not appreciated the case of prosecution and has not taken the defence plea in correct legal perspective. The variation which was found by the F.S.L. during analysis as discussed by learned trial Judge in paragraph 14 of the impugned judgment and order reveals that it was more than permissible variation of 0.03330. As per the register, the density was 0.7259 and density found by the F.S.L., at a particular temperature was 0.7311 (Exh.23), so the difference cannot be said to be more than negligible. It is relevant to note that the variation is not very high under which adulteration can be presumed. As no variance was found during the spot inspection and test, which itself indicates the circumstance that variation was not high otherwise the Officer who tested the density on the spot could

have noticed that much variation.

8. The Apex Court in case of **Nathulal Vs. State of Madhya Pradesh, reported in A.I.R. 1966 S.C. 43 (VOL. 53 C12)** has observed that presence of mens rea should be established by prosecution in essential commodities cases and in such a case it would not be either legal or proper or justify to presume the presence of *mens rea*. True it is that in a given case, the Court can say that formal proof of *mens rea* is not required but the Court can infer the presence of *mens rea*. So, in such a case where the variation is somewhat more than negligible, the Court may not quash the proceedings but while appreciating the evidence led by prosecution and reaching to a finding of guilty, has to consider the percentage of variation and the Court is of the view that the trial Court ought to have given the benefit to the appellant-accused.

9. The learned trial Judge could have appreciated the mandatory scheme of sub-rule 4 of Rule 8 of the Order as quoted herein above. To avoid

serious prejudice, the scheme of Rule 8 has been carved out and sub-rule 4 is the heart of the entire Rule 8. Because it governs various aspects including the aspect of fairness of investigation and the transparency while prosecuting a person. So, on the sole ground of non-compliance of sub-rule 4 of Rule 8 of the Order and in absence of any positive evidence to that effect, the trial Court should have acquitted the accused persons. So, accepting the first two arguments advanced by Mr.Joshi, the Court is inclined to allow this appeal by holding that the finding arrived at by the learned trial Judge is erroneous and incorrect because of non-appreciation of the evidence in correct legal perspective. Of course, the judgment relied upon by Mr.Joshi in case of **Panchvati Auto Center (Supra)** clearcut ratio but as the Court is not in agreement with the say of Mr.Joshi that the variation in the present case is equal to negligible and that part of argument has been weighed with the Court but when it is the settled legal position that if the accused is entitled to acquittal on any single ground then he should be acquitted. Therefore, on account of non-

compliance of sub-rule 4 of Rule 8 of the Order the judgment and order of conviction and sentence requires to be quashed and set aside.

10. In view of aforesaid discussion, present Appeal is allowed. The judgment and order of conviction and sentence dated 4th September, 2001, rendered by the learned Special Judge, Panchmahal at Godhra in Special Case No.6 of 2000 is hereby quashed and set aside. The appellants are acquitted of the charge of offence punishable under Sections 3 read with Section 7 of the Essential Commodities Act, 1955. Fine, if paid by the appellants, are ordered to be refunded to them on proper identification.

10.1 Bail Bond executed by the appellants-accused shall stand discharged. Order and Direction accordingly.

(C.K.BUCH, J.)

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